SUPREME COURT, U. S.

JUN 19 1961

JAMES R BROWNING Clerk

No. 162

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

D. H. ROE AND STRATORAY OIL, INC.,
Petitioners

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE SUPREME COURT OF THE UNITED STATES:

D. H. Roe and Stratoray Oil, Inc., petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 17, 1961, petition for rehearing denied May 23, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 936 to 950) is reported at 287 F. 2d 435, and a copy thereof is appended to this petition in the appendix at pages A-1 to A-15.

JURISDICTION

The judgments of the United States District Court for the Northern District of Texas were made and entered on December 18, 1958 (R. 904 to 908 and 916 to 918), and copies thereof are appended to this petition at pages A-16 to A-22 of the appendix. The judgment of the Court of Appeals for the Fifth Circuit was made and entered on February 17, 1951 (R. 951), and a copy thereof is appended to this petition in the appendix at page A-23. Petitioners' petition for rehearing was denied on May 23, 1961, (R. 968). A copy of the order overruling petitioners' motion for rehearing is appended to this petition at page A-24 of the appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Appellants were convicted of the unlawful use of the United States Mail to sell and carry securities, there not being in effect with the Securities and Exchange Commission a registration statement as to such securities, in violation of Section 77 e (a) (1), and 77 e (a) (2), Title 15 U.S.C. The Court of Appeals recognized that the fundamental question involved was whether petitioners dealt in securities as defined by Section 77 b (1), Title 15 U.S.C. If petitioners did not deal in securities, the Government had no case against them, and their motion for judgment of acquittal should have been granted. The Court of Appeals resolved this question against the petitioners, but it reversed and remanded because of errors in the

trial court's charge. The questions here presented are:

1. Whether a transaction involving the sale of the entire 7 8ths mineral lease in a specific piece of property, induced by the prospect of profit from an increase in value of such property by a drilling program on other land by others than the sellers, the purchases having no interest in such program and contributing nothing thereto and with no representations that any of the purchase price of the lease shall be used in such development program, constitutes dealing in an "investment contract" and hence a security.

2. Whether a judgment of acquittal should have been rendered on the grounds that there was no evidence that the petitioners offered, sold or caused to be carried through the mails an "investment contract" or "security."

STATUTES INVOLVED

The statutes involved are 15 U.S.C. 77 b (1), 15 U.S.C. 77 e (a) (1), 15 U.S.C. 77 e (a) (2), the pertinent portions of which are set forth in the appendix at pages A-25 to A-26.

STATEMENT

Petitioners, D. H. Roe and Stratoray Oil, Inc., and one Vivian W. Buie were indicted August 16, 1957 on 20 counts, charging the unlawful use of the United States mails in the employment of a device, scheme, and artifice to defraud in the sale of securities in violation of Section 77 q (a) (1), Title 15, U.S.C. (counts 1 to 7, inclusive, of the indictment); the un-

lawful use of the United States mails in executing a scheme and artifice to defraud, in violation of Section 1341, Title 18, U.S.C. (counts 8 to 14, both inclusive, of the indictment); the unlawful use of the United States mails to sell and carry securities, there not being in effect with the Securities and Exchange Commission a registration statement as to such securities, in violation of Section 77 e (a) (1), and Section 77 e (a) (2), Title 15, U.S.C. (counts 15 to 19, both inclusive, of the indictment); unlawful conspiracy to violate Sections 77 e (a) (1), 77 e (a) (2), 77 q (a) (1), Title 15, U.S.C., and Section 1341, Title 18, U.S.C., in violation of Section 371, Title 18, U.S.C. (count 20 of the indictment) (R. 1-7, 927, 928). The indictment was returned to the Fort Worth Division of the United States District Court for the Northern District of Texas and filed as Criminal No. 9756. Trial was commenced at Fort Worth, Texas, on December 8, 1959 before the Honorable T. Whitfield Davidson (R. 7, 8, 9, and 26).

Twelve counts of the indictment were concerned with an alleged fraudulent scheme (R. 1-7, 927-928). The court's charge was primarily concerned with such counts (R. 491-529), and the trial lasted seven or eight days (R. 492).

At the conclusion of the evidence, the petitioner Roe moved the court to enter its judgment of acquittal to each and all of the 20 counts of the indictment, excepts counts 2 and 10, which had been dismissed on motion of the Government (R. 8-13). The jury returned a verdict of not guilty as to the counts charg-

ing petitioner Roe with fraud and conspiracy. The jury returned a finding of guilty on counts 15 to 19, inclusive, as to petitioner Roe, and a finding of guilty as to 1, 3 to 9, both inclusive, and 11 to 19, both inclusive, with respect to the petitioner Stratoray Oil, Inc. (R. 902, 903). Vivian W. Buie was found not guilty on all counts.

The court held that, as a matter of law, the petitioner Stratorary Oil, Inc. was not guilty on counts 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14 (R. 547). Upon the jury's verdict on the remaining counts, the court assessed the petitioner Roe's punishment at 5 years imprisonment and $5,000.00 fine, generally (R. 916, 917), and fined the petitioner Stratoray Oil, Inc. $5,000.00 generally (R. 906, 907). The petitioners appealed from such judgment to the United States Court of Appeals for the Fifth Circuit (R. 908, 910).

Insofar as the counts upon which petitioners were convicted are concerned, the securities were alleged to be investment contracts evidenced by assignments of oil and gas leases, coupled with collateral agreements, promises, and undertakings that wells would be and were being drilled in the vicinity of the lands covered by the leases to test and prove the oil and gas productivity of the surrounding area, including the tracts of land covered by the assignments (R. 2-6).

Counts 15, 16 and 17 of the indictment charge use of the mails to sell securities on June 15, 1956, April 12, 1956 and September 12, 1956, respectively. Counts 18 and 19 of the indictment charge that securities were caused to be carried through the mails on July

30, 1956 and November 15, 1956, respectively (R. 2-6).

The prosecution was based on the offer and sale of oil and gas leases on lands situated in Davis, Tooele, and Salt Lake Counties, Utah, and Val Verde County, Texas (R. 2-6, 33, 34). The offers and sales were made first by Roe and H. A. Penn, d/b/a Roeco Oil Company, and later by the petitioner Stratoray Oil, Inc., of which the petitioner Roe was president and H. A. Penn was assistant vice-president (R. 31, 32).

The Government apparently relied on wells drilled or to be drilled by others than petitioners, but referred to in the mailings, as proof of the alleged collateral agreements, promises and undertakings.

The undisputed evidence, introduced through the Government's chief witness, H. A. Penn, shows that the petitioner Roe was introduced to the selling of leases through the mail by H. A. Penn (R. 22, 55, 91). Roe became a partner of Penn in this business (R. 61). Penn managed the office, while the petitioner Roe took care of the field work (R. 32, 81, 82). The field work consisted primarily of making surveys (R. 65). Roe knew absolutely nothing about selling leases through the mail (R. 55). For the first month, business was done under the name of Roeco Oil Company; thereafter, the business was conducted through the petitioner Stratoray Oil Company, Inc. (R. 31). The relationship continued until July 26, 1956 (R. 35). The leases, lists of names, and all necessary arrangements were made by Penn (R. 56, 57). The letters bore a facsimile of the signature of D. H. Roe (R. 73-

74). In fact, the petitioner Roe never knew what was contained in the mailings until after Penn left July 26, 1956 (R. 416, 437). However, Penn was not indicted (R. 54).

Two wells are referred to in the mailings. These were apparently relied on by the Government as part of its proof of the offense of which the petitioners were convicted. One well, known as the Woodley-Garson, Walker-Wilson Cassity No. 1 Well, was located in Tooele County, Utah (R. 38). The other well was located in Val Verde County, Texas, and was known as the White-Rose No. 1 Well (R. 44). Reference was also made to wells proposed or being drilled by the Texas Company, Phillips Petroleum and others.

The court below, in its opinion, stated that the record warranted a holding that the petitioners had, directly or indirectly, made substantial contributions toward the test wells. However, there is no evidence in the record that the petitioners, or either of them, made such contributions.

There is no evidence that petitioners made any contribution to the driller of the well in Texas. H. A. Penn transferred about 640 acres to White prior to March 24, 1956 (Government's Exhibit 12-C, R. 634). The record is silent as to whether value was paid for the assignment. At that time the petitioner Roe had nothing to do with the mailings or offering to sell or sale of any leases (R. 32, 80, 82, 405, 406).

Neither of the petitioners nor Penn had any interest in the Utah well (R. 59, 69). Gamma Radiation, Inc.,

a corporation formed by the petitioner Roe, H. A. Penn and Louie White, acquired an interest in the Utah well (R. 59). Gamma Radiation was formed for the purpose of making surveys and acquiring leases, with a view of developing a production company (R. 58). It was a separate business from the lease selling business (R. 58). Gamma Radiation owned no interest in the Texas well (R. 60). The record affirmatively shows that the petitioner Roe owned only a one-third interest in Gamma Radiation, Inc., until December, 1956, when he had bought Penn's interest (R. 70). After Penn left the petitioner Stratoray Oil, Inc. on July 26, 1956, Penn acquired, in August, White's one-third interest, making him owner of two-thirds of Gamma Radiation, Inc. (R. 37, 40). The leases owned by the petitioners in Utah were not the ones on which the well was located (R. 59). There is no evidence that either of the petitioners made a contribution to the Utah well. Gamma Radiation, Inc., a separate business (R. 58), was not "dominated" or "wholly owned" by petitioner Roe at any time material to the indictment.

There was no statement in any of the mailings that either of the petitioners or Gamma Radiation, Inc. had any interest in any of the wells or made any contribution to them. The letters negated any such inference (Government's Exhibit 12-R, R. 855; Government's Exhibit 24-B, R. 897; Government's Exhibit 12-C, R. 634; Government's Exhibit 3-A, R. 607). There was no representation that the purchaser was contributing to the test wells, nor was he asked to so contribute. There was no representation that any of the purchase

price of the lands would be used for development; there was no agreement or representation that the various tracts would be developed together, operated together or sold together; nor was there any representation that the seller would operate, control, develop or sell the tracts offered for sale. It was left entirely to the purchaser whether he should subsequently sell, hold, develop and manage his own individual lease and oil therefrom. The purchasers received no interest in the tracts of other purchasers, nor in unsold tracts of the seller, nor in the test well, nor in any production therefrom.

PETITIONERS' POSITION: It is petitioners' position that a judgment of acquittal should have been entered for the following reasons:

1. The sale of the entire 7/8th mineral lease interest in a specific piece of property does not constitute the sale of a "security" under the Securities Act.

2. There was not any sale, offer of sale, or delivery of a "fractional undivided interest in oil, gas or other mineral rights" as the definitive section of the Securities Act includes as a "security".

3. The leases did not fit with any interest specifically itemized in the Securities Act as being a "security".

4. The transactions of petitioners did not constitute dealing with "investment contract" either under the terms of the indictment or the holdings of this Court.

5. As a "security" was not involved, there was no

necessity for registration with the Securities and Exchange Commission.

REASONS FOR GRANTING THE WRIT

I

The decision of the court below should be reviewed for the reason that it erroneously interprets the Securities Act and the holding of this Court in *S.E.C. v. W. J. Howey Company, et al*, 328 U.S. 293, 66 S.Ct. 1600, 90 L.Ed. 1244, rehearing denied, 329 U.S. 819, 67 S.Ct. 67, 91 L.Ed. 678, and *S.E.C. v. C. M. Joiner, et al*, 320 U.S. 344, 64 S.Ct. 128, 88 L.Ed. 88, in such manner as will greatly hinder the development and discovery operations of the oil industry as a whole, including the small and large independents, as well as the major oil companies. The language of the opinion of the court below is so broad that it includes all transactions involving the sale of any property, induced by the prospect of profit from an increase in the values of the property so sold. Property increases in value because the ownership of that property is desired by others, and this desire for ownership is often motivated by the profitable development of surrounding or similar properties. The decision of the court below has decided an important question of federal law which has not been, but should be, decided by this Court.

The counts of the indictment under which petitioners were convicted allege that the leases offered for sale and carried througn the mails were securities. The securities were described as investment contracts,

evidenced by assignments of oil and gas leases, coupled with collateral agreements, promises and undertakings that wells would be and were being drilled in the vicinity of the tracts of land to test and prove the oil productivity of the area surrounding the wells, including the tracts of land covered by the lease assignments. The very allegations in the indictment require representations that petitioners would drill such test wells. In no other way, could the assignments be coupled with collateral agreements, promises and undertakings that wells would be and were being drilled in the vicinity of said tracts. Such allegations require proof that the petitioners agreed to develop, operate or deal with the leases offered or sold.

The court below held that a "security" was involved on the ground that the promoters were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers; and in that setting, it mattered not whether the test wells were to be drilled by the sellers, or by third persons either under, or independent of, their control. The court further held that the record warranted a holding that both the petitioners had, directly or indirectly, made substantial contributions toward the test wells. However, as heretofore stated, it is petitioners' position that the record does no warrant such holding, and in any event, any such evidence is outside the terms of the indictment.

The term "investment contract" is not defined by the Securities Act. This Court has defined an "invest-

ment contract" as follows:

> "An investment contract for the purposes of the Securities Act means a contract, a transaction or scheme whereby a person *invests his money in a common enterprise* and is led to expect a profit solely from the efforts of the promoter or third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interest in the physical assets employed in the enterprise." (Emphasis ours).
>
> *S.E.C. v. Howey Company, et al*, 328 U.S. 293, 66 S.Ct. 1600, 90 L.Ed. 1244, rehearing denied, 329 U.S. 819, 67 S.Ct. 67, 91 L.Ed. 678.

The *Howey* case, defining "investment contracts", and the *Joiner* case, dealing with oil and gas leases, are clearly distinguishable from the instant case. In both the *Howey* and *Joiner* cases, the purchasers were looking directly to the seller for the development of the property sold. Payment was made to be applied directly to the development of the lands involved. In each case, the contract called for the development of the lands involved under the control of the sellers, and in both cases the development was operated as a common enterprise.

In this case there was no community of enterprise. There was no representation that the purchaser was contributing to the test wells, nor was he asked to so contribute. There was no drilling obligation to keep the leases in force. There was no representation that any of the purchase price of the lands would be used for development. There was no agreement or represen-

tation that the various tracts would be developed together, operated together, or sold together; nor was there any representation that the seller would operate, control, develop or sell the tracts offered for sale. It was left entirely to the purchaser whether he should subsequently sell, hold, develop and manage his own, individual lease and the oil therefrom. The purchasers received no interest in tracts of other purchasers, nor in the unsold tracts of the seller, nor in the test well, nor in any production therefrom.

In the *Joiner* case, this Court noted that the Legislature did not intend to burden legitimate trading of oil and gas leases. The Court said: ". . . leases and assignments were also indispensable instruments of legitimate oil exploration and production." 320 U.S. 352. However, the holding of the court below will burden legitimate trading of oil and gas leases. And in this case, it should be remembered that the jury washed out any moral overtones of fraud. It is common knowledge that persons engaged in the oil industry buy, sell, assign and traffic in oil, gas and mineral leases, and particularly those covering land near producing oil or gas wells or wells being drilled.

The questions presented are important to petitioners, to the oil industry, and to the real estate business. This Court has not held that assignments of oil and gas leases or sales of land under the instant circumstances are investment contracts.

It is respectfully submitted that this Court should finally determine whether the sale of a specific piece of property induced by the prospect of profit from an

increase in its value by reason of an increase in value of other land due to conditions or improvements created by others than the seller, the purchasers having no interest in such conditions or improvements and contributing nothing thereto, and there being no representations that any of the purchase price for the land should be used to create such conditions or improvements, constitutes dealing in an "investment contract" and hence a security.

II

It is respectfully submitted that the decision of the court below extends the holding of this Court in the *Joiner* and *Howey* cases beyond their original intendment. No other court has gone so far as the court below in holding that the transaction involved investment contracts.

The *Joiner* case, a case dealing specifically with oil and gas leases, does not purport to hold that reference to an independent drilling or development program will create an investment contract out of that which ordinarily would not be so considered. In the *Joiner* case, the offering letters did not mention the drilling conditions which the purchasers would need or the cost he would incur if he attempted to develop his own acreage. The leases were subject to a drilling obligation. Joiner expected to finance the drilling of the wells from the sale of leases. The offering literature assured the prospects that the Joiner Company was engaged in and would complete the test wells. The balance of the purchase price was due after the wells

were completed. The purchaser was paying for both the lease and a development contract.

Likewise, in the *Howey* case, the controlling facts determinative of an "investment contract" included the offering of an opportunity to contribute money and to share in profits of a large citrus fruit enterprise, managed and partially owned by the sellers, offered in small tracts, which gained utility as citrus groves, only when cultivated and developed as component parts of a larger area. That is, a common enterprise managed by the sellers with adequate personnel and equipment. The investors provided the capital and were to share in the earnings and profits; the promoters managed, controlled and operated the enterprise.

If the petitioners were not dealing in securities, a judgment of acquittal should be entered, and petitioners should not be subjected to another trial.

III

The questions here presented arise daily in the activities of those engaged in the discovery and production of oil, gas and minerals. The value of leases and such interest is often based on development and discovery activities which are sometimes carried on by the seller and sometimes by others, who without question, are not in any way connected with the seller. This value fluctuates from day to day, depending on the result of such activities. Time is usually of the essence to the purchaser, as well as the seller. It is important that legitimate trading in oil, gas and min-

eral leases should not be burdened. If the holding of the court below stands as the law, many of these transactions could require registration under the Securities Act or be in violation thereof. The problem of administering and applying the Act by the Securities Exchange Commission will remain. The application of the Securities Act by the courts will remain uncertain. This case is an extremely appropriate one for the exercise of this Court's jurisdiction.

CONCLUSION: For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted to the United States Court of Appeals for the Fifth Circuit.

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I, Leo Brewster, one of the attorneys for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13 day of June, 1961, I served a copy of the foregoing petition for writ of certiorari to the Supreme Court of the United States on the respondent United States as follows:

1. By mailing a copy in a duly addressed envelope, with air mail postpage prepaid, to The Solicitor General, Department of Justice, Washington, 25 D. C.;

2. By mailing a copy in a duly addressed envelope, with postage prepaid, to Hon. W. B. West, III, United States Attorney, Federal Courthouse, Fort Worth, Texas.

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LEO BREWSTER

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18162

D. H. ROE and STRATORAY OIL, INC.,
Appellants,

versus

UNITED STATES OF AMERICA
Appellee.

Appeals from the United States District Court for the Northern District of Texas.

(February 17, 1961.)

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

BROWN, Circuit Judge: As this case percolates to us, it is but a bare shadow of its former self in the trial court. There it was a multi-party, multi-count indictment against Roe individually, the corporation, Stratoray Oil Company, Inc. of which Roe was President, and another, an advertising writer. At the heart of this case as the jury heard the evidence for many, many days was a high-pitched, hard-sell extravagant solicitation campaign to sell through the mail to thousands of persons over the United States oil leases on small tracts in Texas and Utah. Counts 1 through 7 charged each with violation of the Securities Act of 1933, Title 15 USCA 77q(a) (1), by the use of the mails to defraud in the sale of securities. Counts 8

through 14 charged each with mail fraud under 18 USCA §1341 in connection with the sale of the same interests. Counts 15, 16, 17, 18 and 19, which alone remain, charged illegal sale and delivery of securities through the use of the mails without a prior registration with the SEC as required by 15 USCA §17e(a)(1) and (2). Count 20 charged a conspiracy under 18 USCA §371 to violate all of the laws forming the basis of Counts 1 through 19. The advertising writer was acquitted on all counts. Roe, individually was acquitted on all fraud counts (1 through 14 and 20). The Court entered a like judgment of acquittal as to Stratoray, the corporation. But Roe and Stratoray were each found guilty under Counts 15 through 19. This means that as we review these convictions, we are not, at this stage, permitted to read into any of the transactions any moral overtones of fraud. We must regard them in the posture of nonfraudulent violations of the registration requirements of the Securities Act. What the jury washed out thus has immediate relevance in our approach. It also highlights the prejudicial effect of the error we find in the Court's charge.

For reasons we later point out, we conclude that the case must be reversed and remanded for error in the Court's charge. But since the case ought not to be retried of these facts, if credited by a jury, do not constitute a federal crime, we think it essential that we first discuss the basic contention of the appellants. In a nutshell it is simply this. The sale of the entire (7 8ths) mineral lease in a specific piece of property does not constitute the sale of a "security" under the

Act. Consequently, since the registration statement is required only as to "a security," there was no violation of this Act.

On the surface there is a good deal to this position. The mailed advertising solicitation material, extravagantly optimistic as it was, offered to the prospects mineral leases only. In the numerous sales effected through this means, that is all that was sold and delivered. There was not, therefore, any sale, offer of sale, or delivery of a "fractional undivided interest in oil, gas, or other mineral rights" as the definitive section of the Act sets forth. Nor did such oil leases fit within any other specifically itemized interests.[1] If they are to come within the term "security" they must do so as an "investment contract."

At this late date we do not think that there can be any real doubt that offerings of oil leases in this fashion may amount to an "investment contract." This was the heading specifically recognized for such transactions by *SEC v. C. M. Joiner*, 1943, 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88, as it reversed this Court's holding that these were sales, not of a security, but an interest in property, real or personal. Because it would

[1] "When used in this subchapter, unless the context otherwise requires –

"(1) the term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or patricipation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 USCA §77b as amended June 1934.

be out of keeping with the remedial object of this legislation reflecting a long current of like enactments in the various states, that case also rejected any construction of the Act on the basis of handy Latin aphorisms that would exclude from coverage mineral interests other than those specifically enumerated as "fractional undivided interest in oil, gas, or other mineral rights." 320 U.S. at 350.

Of course it takes something more than a mere "offering [of] naked leasehold rights," 320 U.S. at 348, or, in a different situation, the mere fee ownership of a piece of land, *Blackwell v. Bentsen*, 5 Cir., 1953, 203 F.2d 690, cert. dismissed 347 U.S. 925, 74 S.Ct. 528, 98 L.Ed. 1078. Regarded as relevant and sufficient by *Joiner* were these factors. The "economic inducements of the proposed and promised exporation well"; submitting a proposition to prospects to sell them "documents which offered the purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise"; the "exploration enterprise was woven into [the] leaseholds, in both an economic and a legal sense." 320 U.S. at 348. Irrelevant, on the other hand, and at least not decisive are other factors such as the nature, real or personal, of the property formally conveyed, or the fact that to appraise its character examination of facts beyond the face of the instrument may be required. For *Joiner* likewise stated, "The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic

inducements held out to the prospect. In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U.S. at 352-53. While it is necessary in any case under the Act to prove "that documents being sold were securities under the Act" which sometimes "might be done by proving the document itself," in "others proof must go outside the instruments itself as we do here." 320 U.S. at 355.

All of this was spelled out with more positiveness in *SEC v. Howey Co.*, 1946, 328 U.S. 293, 298, 66 S.Ct. 1100, 90 L.Ed. 1244. "Form", that case announces is to be "disregarded for substance and emphasis" is to be "placed upon economic realities." Folowing the pattern of state legislation so well known to Congress, the Court declared that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." 328 U.S. at 298-99. Expressed somewhat differently, the "test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. at 301.

Certainly the facts of this record more than satisfy the *Joiner-Howey* standard. These sales pitches were more than mere extravagance of the wildest opti-

mism.[2] Each of them was based upon the economic significance of an existing or proposed test well. It was, so the offering letters stated, these test wells in Utah and in Texas which would suddenly—indeed overnight—give to these small-patch leases sold for as little as $10 an acre a value in excess of $1,000 per acre. Wealth, the blurbs continued, would come to these retired school teachers, cobblers, nurserymen, and others, from the stampede of oil men rushing into the area in a mad scramble to buy leases once the test wells were brought in. This wealth, so it was spelled out in terms which the gullible, young and old, could understand, would come from sales of the leases at these fabulously increased prices together with overriding royalties in future production reserved in such transfers.

In summarizing the hundreds of pages of these exuberant solicitation letters in this fashion, we do not mean to slip obliquely into moral judgments which, at the outset, we emphasized were no longer in the case. We may, as did the Supreme Court in *Joiner*,[3] credit all of these as being made in the best of faith and,

[2]Between March 10, 1956, and April 17, 1957, over 54,504 copies of various sales pitch letters were mailed for Stratoray under Roe's signature by a letter-mailing service. The mailing lists were maintained by the letter-mailing service or by Roe or his associates, some of them running to as high as 10,000 names. The lists were the names and addresses of persons unknown to the user. Each list had its own peculiar designation, such as "the Louie White List," the "New York List," the "Utah List," the "Crader List," the "New List," the "Nevada List." The "Buyers List" and the "Hot List" apparantly included those who had already purchased at least one list. These prospects were importuned by telegrams as well. The promotional campaign was highly successful as income from the sale of leases to the small parcels ran about $233,000 during 1956 alone. By about November 1956, Roe and Stratoray had "roughly 1,000 inventors."

[3]See footnote 4, 320 U.S. at 347.

indeed, with a substantial factual basis. The significance of them is not in their extravagance nor even their possibly misleading nature. They are significant because, taken at face value, they offer to the prospective purchaser a chance to reap great rewards—indeed get rich quick—not out of the operation of these leases by the purchasers, but solely because of activities of persons other than the purchasers.[4]

The economic inducement, the allure of this stream of liquid gold, as one letter described it, was the spectacular increase in values of the leases without anything but a patient gullibility upon the part of beguiled purchasers. The promoters were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by the sellers, or by third persons either under, or independent of, their control.[5] What the purchasers were

[4]Except that the letters transmitting executed formal assignments of leases to those actually making purchases called attention to the nominal delay rentals due year after year which would be payable by the purchasers, none of the sales material ever intimated that the purchasers' wealth was to come from his development of his own lease. On the contrary, with the immoderation characteristic of these ghost-written sales letters, the emphasis by Roe and Stratoray was on how much money had to be spent and how much valuable, large, heavy equipment had to be furnished by those drilling, or about to drill, the exploratory test wells. A reasonably prudent-imprudent, prospective purchaser was certainly entitled to infer that the promised bonanza would come to him without any like expenditure on his part. Indeed, the idea of a cobbler from North Carolina going to Utah to develop his 40-acre lease as a means of reaping his reward is so preposterous that not even the sales letters came close to implying that.

[5]In *Howey* the element of expectation of "profits solely from the efforts of the promoter or a third party," 328 U.S. at 299, which are "to come solely from the efforts of others," 328 U.S. at 301, as well as that case's restatement of the *Joiner* holding in the broadest of terms, certainly overcomes any imputation that language in *Joiner* that the "drilling of this

told was that after they acquired these pieces of property (leases), the activity and energies and expenditures of others— the backers of the test wells—would produce earnings on the investment. That is enough. *Price v. United States*, 5 Cir., 1953, 200 F.2d 652, 654. All of this is reviewed extensively in the opinion of Chief Judge Murrah for the 10th Circuit in *Woodward v. Wright*, 1959, 266 F.2d 108, 112.

In addition, considering that Roe was the president and dominating character of Stratoray through whom Stratoray alone acted for much of the period involved, this record warrants a holding that each had, directly or indirectly, made substantial contributions toward the test wells. In the Texas area it aws a contribution of a section of leases to the driller of the well. In Utah

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well was not an unconnected or uncontrolled phenomenon" etc. meant to require that the collateral activity be that of the seller or one under his control. Loss, Securities Regulation, 1955 supp. p. 149, as much as says so. "Mr. Justice Jackson's statement that "The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense,' would seem to apply equally in principle whether the exploration is being done under the seller's control or by a third person." Discussing this same problem, Bloomenthal, *SEC Aspects of Oil and Gas Financing*, 7 Wyo. L.J. 49, 55 (1953), points out that "from the standpoint of the investor it makes little difference whether the promoter points to a well being drilled by him or whether he points to a well being drilled by someone else. In both instances the purchaser of oil and gas leases in order to make an informed investment must have available pertinent geological information." Written in 1953 this author could not have read the Roe letters created in 1956. But without our suggesting that Roe's action was taken articulately in the light of *Joiner*, what the author describes is almost a paraphrase of this record. "There are unfortunately at the present time a number of promoters who, aware of the implications of the *Joiner* case, are offering oil and gas leases on small specifically described tracts and in connection with such sales point to wells being drilled or to be drilled by someone else in the area. As a rule very flamboyant literature featuring vague and general statements and predictions of future developments carefully drawn so as to make criminal prosecution under the mail fraud statute difficult if not impossible, is used in connection with such offerings. * * *." See also Meer, Oil Finance and The Securities Laws, 29 Texas L. Rev. 885, 888 (1951).

it was a substantial payment of cash through the instrument of another corporation dominated and later wholly owned by Roe. More than that, the sales letters openly boasted that the locations of the test wells had been fixed by Roe through the use of his "gamma ray scintillator unit." That was, so he boasted, followed by continued supervision and "sitting on" the wells either in person or through geologists selected by him. And, for good measure, the lure of profits through the scintillator was dramatized by the promise that if the particular leases then offered were purchased, those purchasers would be entitled later on to participate in "pyramid priority rights" to purchase "a series of leases selected by [Roe] on the basis of electronic scintillation unit gamma radiation anomally findings * * *."[6]

Thus we determine that, as a matter of law, the evidence of these transactions, if credited, would constitute the sale or delivery of an "investment contract," hence a "security" thereby requiring registration with the SEC. But the if in "if credited" is a big one. By its very nature, it is the peculiar facts of the setting which turns the offer from a mere sale of property into a sale of a security. That means that the trier of fact, here a jury, must determine the issue. More than that, this being a criminal case in contrast to the more common injunction proceeding or damage suit under

[6]To cap it all the testimony reflected that in their day-to-day operation, Roe and Stratoray and their associates in this intense campaign of mail solicitation referred to the prospects as their "investors." This brings sharply back to mind Mr. Justice Jackson's apothegm that "In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U.S. 344 at 353.

the Act, two principles inescapably apply. First, in Mr. Justice Jackson's words "in a civil action * * * a preponderance of the evidence will establish the case: * * * in a criminal case [the evidence must] meet the stricter requirement of satisfying the jury beyond a reasonable doubt." 320 U.S. 344, 355. Second, and here more decisive, no fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the Trial Court may never instruct a verdict either in whole or in part.[7] *United Brotherhood of Carpenters and Joiners of America v. United States*, 1947 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed. 973; *Christoeffel v. United States*, 1949, 338 U.S. 84, 89, 69 S.Ct. 1447, 93 L.Ed. 1826; *Brooks v. United States*, 5 Cir., 1957, 240 F.2d 905; *Hamilton v. United States*, 5 Cir., 1955, 221 F.2d 611, 615; *Schwachter v. United States*, 6 Cir., 1956, 237 F.2d 640, 644; *United States v. Gollin*, 3 Cir., 1947, 166 F.2d 123, 126, cert. denied, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151.

And yet, that is substantially what the Trial Judge did here on the crucial issue of whether these were investment contracts. He instructed them flatly and without equivocation that they were.[8]

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[7]See, Directed Verdicts for the Prosecution in Criminal Cases, 7 Wyo. L. J. 37 (1952).

[8]As constructed, Instruction No. 3, 4 and 5 related to the Counts under the Securities Act (Counts 1-7 for fraud, 15 USCA §77q (a) (1). Counts 15-19 under 15 USCA §77e(a) (1) and (2)). The definition of a "security" applicable to all such counts was stated in Instruction 3 but was applicable to Instruction 4 and 5 covering the nonregistration counts (15-19) as follows:

"A 'security' is defined in the Federal Securities Act, 15 USC 77 (b)

This was no mere permissible expression of his opinion on what the evidence showed.[9] For he translated this into positive action that if "*the* investment contracts" were "offered for sale" by defendants "these defendants did engage in the sale of securities within the meaning of the Federal Securities Law." Neither as to the fraud counts covered by Instruction 3 nor as to the non-registration counts (covered by Instruction 4 and 5) did the Court ever submit the question whether these were investment contracts within the legal definition stated by the Court. As to the counts on which the jury returned a verdict of guilty (15-19), all that was submitted was whether the defendants (1) used the mails to sell or deliver and (2) whether a securities registration was in effect. The subject of the sale or registration impliedly incorprated within these two issues was, of course, "securities namely, investment contracts." But as to

(1) to include among other things an investment contract.

"You are instructed that assignments of oil and gas leases coupled with collateral agreements, promises and undertakings that wells would be and were being drilled in the vicinity of tracts of land on which such oil and gas lease assignments are offered for sale to test and prove the oil and gas productivity of the area surrounding said wells to be drilled, including the tracts of land covered by said lease assignments offered for sale are investment contracts and are, therefore, a security within the meaning of the law.

"Since it is clear that the investment contracts described in the first count of this indictment come within the definition of the term 'security' as set forth in the Federal Securities Act, I instruct you that if you find and believe from the evidence beyond a reasonable doubt that the investment contracts were offered for sale or sold by these defendants that these defendants did engage in the sale of securities within the meaning of the Federal Securities Law."

[9]The charge did not contain an instruction in the traditional language making it clear that expressions of opinion by the Judge on the evidence were in no way binding upon the jury as the sole trier of the facts. This is asserted as an independent ground of error as is the failure to give an instruction about the possible self-interest of Government witnesses. We need not pass on these complaints as such.

this the Court had already given precise directions in unmistakable terms.

On such a crucial matter, particularly in a long dramatic trial, the greater part of which was preoccupied with phases involving claimed misrepresentation and active fraud growing out of these flamboyant high pressure sales letters—and on which the jury was not moved to convict—it was essential that full and plain instructions be given. In clear and understandable language the Judge should have told the jury that to convict it must first find that, within the definition of an investment contract given by the Court, these transactions were an investment contract. Only then, did sale throught the mail without registration become a federal crime.

Constructed as this charge was, the Court's instruction, note 8, *supra*, was not, as suggested by the Government, a mere declaration that the indictment was sufficient. That was a matter of no concern to the jury, and the lawyers from the long agony of the trial were already conscious that that was so. The Court had passed the point in his charge of describing the indictments and was here translating instructions into definitive action by the jury depending upon its resolution of the facts.

In the face of objections stated with precision and clarity complaining of the charge as a partial direction of a verdict of guilty and a failure to submit to the jury a crucial issue, the Court was obliged to take corrective steps so that the jury would clearly understand that it had three, not two, issues for decision.

The failure to do this was a substantial and harmful error.

The appellant also asserts that the Court erred in not giving an appropriate instruction on "willfully" as it is used in the Act.[10] They contend that "willfully" as used connotes a consciousness that the law was being violated, i.e., done with an evil purpose. They assert that this is required under such cases as *United States v. Kemball*, 3 Cir., 1952, 197 F.2d 316; *Hargrove v. United States*, 5 Cir., 1933, 67 F.2d 820; *Bloch v. United States*, 9 Cir., 1955, 221 F.2d 786. To these might well be added: *St. Johnsbury Trucking Co. v. United States*, 1 Cir., 1955, 220 F.2d 393; *Boyce Motor Lines, Inc. v. United States*, 1952, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367; *Automatic Canteen Co. v. F.T.C.*, 1953, 346 U.S. 61, 73 S.Ct. 1017, 97 L.Ed. 1454. The Government, on the other hand, insists that this is but another instance of a public welfare *malum prohibitum* statute requiring only that the actor intentionally, i.e., not accidentally, negligently, etc., do the act which the statute condemns, the law thereafter imputing the "willful" intention to do all that which is the natural consequence of such an act. The Government rests on the principles expressed in some leading cases[11] and cites a number of others applying such

[10]"Any person who *willfully* violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof • • • shall upon conviction be fined not more than $5,000 or imprisoned not more than 5 years, or both." Emphasis added. 15 USCA §77x.

[11]United States v. Dotterweich, 1943, 320 U.S. 277, 280, 64 S.Ct. 134, 88 L.Ed. 48; United States v. Balint, 1922, 258 U.S. 250, 251, 42 S.Ct. 301, 66 L.Ed. 604; United States v. Behrman, 1922, 258 U.S. 280, 288, 42 S.Ct. 303, 66 L.Ed. 619; cf. Lambert v. California, 1957, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228. Of course this whole complex

principles to regulatory statutory schemes analogous to the Securities Act.[12] And it points to two cases under the Securities Act so holding[13] and others implying as much.[14]

We agree, however, with the Government that this point was not adequately reserved by appropriate objections, and the circumstances do not call for our taking notice of it as plain error. We think resolution

field is discussed at length in Morissette v. United States, 1952, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, and many of the cases from this Court are catalogued in United States v. DeWitt & Berrick, 3 Cir., 1959, 265 F.2d 393, 402-04 (dissenting opinion).

[12]Fraud and False Statements (18 USCA §§1001-1026): McBride v. United States, 5 Cir., 1955, 225 F.2d 249, 253-255, cert. denied, 350 U.S. 934, 76 S.Ct. 306, 100 L.Ed. 816; McClanahan v. United States, 5 Cir., 1956, 230 F.2d 919, 924, cert. denied, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed.2d 47.

Interstate transportation of firearms (15 USCA §902): Braswell v. United States, 10 Cir., 1955, 224 F.2d 706, 709, cert. denied, 350 U.S. 845, 76 S.Ct. 86, 100 L.Ed. 752.

Fair Labor Standards Act (29 USCA §§201-219: Nabob Oil Company v. United States, 10 Cir., 1951, 190 F.2d 478, 480, cert. denied, 342 U.S. 876, 72 S.Ct. 167, 96 L.Ed. 658.

Interstate Commerce Act (49 USCA §§1-27): United States v. Gunn, W.D.Ark., 1950, 97 F.Supp. 476, 480; Inland Freight Lines v. United States, 10 Cir., 1951, 191 F.2d 313, 316; United States v. E. Brooke Matlack, Inc., D.C.Md., 1957, 149 F.Supp. 814, 819.

Emergency Price Control Act of 1942 (50 USCA App. §§901-946): Zimberg v. United States, 1 Cir., 1944, 142 F.2d 132, 137, 138, cert. denied, 323 U.S. 712, 65 S.Ct. 38, 89 L.Ed. 573; Watts v. United States, 5 Cir., 1947, 161 F.2d 511, 514, cert. denied, 332 U.S. 769, 68 S.Ct. 81, 92 L.Ed. 354.

Registration of narcotics offenders (18 USCA §1407): Reyes v. United States, 9 Cir., 1958, 258 F.2d 774, 781-85.

Eight hour law (40 USCA §321): Ellis v. United States, 1907, 206 U.S. 246, 257, 27 S.Ct. 600, 51 L.Ed. 1047.

Miscellaneous decisions: Sinclair v. United States, 1929, 279 U.S. 263, 299, 49 S.Ct. 268, 73 L.Ed. 692; Dennis v. United States, D.C. Cir., 1948, 171 F.2d 986, 990, affd. 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734; Fields v. United States, D.D.Cir., 1947, 164 F.2d 97, 100, cert. denied, 332 U.S. 851, 68 S.Ct. 355, 92 L.Ed. 421.

[13]United States v. Sussman, E.D.Pa., 1941, 37 F.Supp. 294, 296; Stone v. United States, 6 Cir., 1940, 113 F.2d 70, 75.

[14]Hughes v. SEC, D.C.Cir., 1949, 174 F.2d 969; Norris & Hirshberg, Inc. v. SEC, D.C.Cir., 1949, 177 F.2d 228, 233.

of that problem under this Act—nearly always a difficult decision—should await a proper presentation.

The remaining exceptions to the charge are without any validity.[15] The other complaints we regard either as inconsequential or not likely to recur.

[15] Refusal of requested Charge No. 18, 21, and 8.

REVERSED AND REMANDED

A true copy
Test: /s/Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
June 5, 1961

[SEAL]

JUDGMENT AND COMMITMENT

Microfilm

United States District Court for the Northern District of Texas, Fort Worth Division

United States of America
No. 9756 Criminal

v.

D. H. Roe

On the 8th day of December, 1959 came the attorney for the government and the defendant appears in person and [1] by counsel, and counts 2 and 10 of the indictment having been dismissed on motion of the U. S. Attorney, the Defendant, D. H. Roe, entered a plea of not guilty to all remaining counts in the indictment: and the jury having returned a verdict of guilty as to counts 15, 16, 17, 18 and 19, on this 18th day of December, 1959.

It Is Adjudged that the defendant has been convicted upon his plea of [2] not guilty, and a verdict of guilty of the offenses of unlawfully using the U. S. Mails to sell securities, and causing securities to be carried through the U. S. Mails for the purpose of sale and delivery after sale, there not being in effect with the Securities and Exchange Commission a registration statement as to such securities, in violation of

[1]Insert "by counsel" or "without counsel;" the Court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

[2]Insert (1) "guilty" (2) "not guilty and a verdict of guilty" (3) "not guilty and a finding of guilty" or (4) "nolo contendere" as the case may be.

Title 15 U.S.C., Sections 77e(a) (1) and 77e(a) (2) as charged [3] in counts 15, 16, 17, 18 & 19, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] five (5) years and that he further be and is hereby adjudged and sentenced to pay a fine of $5,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

T. WHITFIELD DAVIDSON
United States District Judge

.....

Clerk

The Court recommends commitment to: [6]
Filed 18 day of Dec. 1959 at ..... o'clock, ...M.
John A. Lowther, Clerk. By Rwe J. McGrew, Deputy.

[3]Insert "in count(s) number ...." if required.

[4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[6]For use of Court wishing to recommend a particular institution.

JUDGMENT AND COMMITMENT

United States District Court for the Northern District of Texas, Fort Worth Division

United States of America
No. 9756 Criminal

v.

Stratoray Oil, Inc.

On the 8th day of December, 1959 came the attorney for the government and the defendant appeared by counsel, and counts 2 and 10 of the indictment having been dismissed on motion of the U. S. Attorney, the defendant entered a plea of not guilty to all remaining counts in the indictment; and the jury having on this 18th day of December, 1959, returned a verdict of guilty as to counts 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18 and 19; and the Court having accepted said verdict as to counts 15, 16, 17, 18 and 19 only, and having adjudged the defendant not guilty as to the other counts enumerated above;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offenses of unlawfully using the U. S. Mails to sell securities, and causing securities to be carried through the U. S. Mails for the purpose of sale and delivery after sale, there not being in effect with the Securities and Exchange Commission a registration statement as to such securities, in violation of Title 15, U.S.C., Sections 77e(a) (1) and 77e(a) (2), as charged [3] in counts 15, 16, 17, 18, and 19, and

[3]Insert "in count(s) number ...." if required.

the Court having asked the defendant whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby sentenced to pay a fine of $5,000.00, generally.

T. WHITFIELD DAVIDSON
United States District Judge,

.....

Clerk

The court recommends commitment to: [6]
Filed 18 day of Dec., 1959 at ..... o'clock, ...M.
John A. Lowther, Clerk. By Rive J. McGrew, Deputy.

[6]For use of Court wishing to recommend a particular institution.

NUNC PRO TUNC as of December 18, 1959 CORRECTED JUDGMENT AS TO DEFENDANT D. H. ROE

Filed December 18, 1959

United States District Court for the Northern District of Texas, Fort Worth Division

United States of America
No. 9756 Criminal

v.

D. H. Roe

On this 1 day of Feb., 1960, has come to the attention of the Court that through inadvertence the judgment entered herein on December 18, 1959, failed to follow the judgment pronounced in open Court in this case, in that the judgment entered failed to dispose of counts, 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 20; and the Court is therefore of the opinion that the judgment as entered on December 18, 1959, should be, and the same is hereby, ordered corrected to read as follows:

On the 8th day of December, 1959 came the attorney for the government and the defendant appeared in person and by counsel, and counts 2 and 10 of the indictment having been dismissed on motion of the U. S. Attorney, the Defendant, D. H. Roe, entred a plea of not guilty to all remaining counts in the indictment; and the jury having returned a verdict of guilty as to counts 15, 16, 17, 18 and 19, on this 18th day of December, 1959.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offenses of unlawfully using the U. S. Mails to sell securities, and causing securities to be carried through the U. S. Mails for the purpose of sale and delivery after sale, there not being in effect with Securities and Exchange Commission a registration statement as to such securities, in violation of Title 15 U.S.C., Sections 77e(a) (1) and 77e(a) (2) as charged in counts 15, 16, 17, 18 & 19, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted on counts 15, 16, 17, 19 and 19.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and that he further be and is hereby adjudged and sentenced to pay a fine of $5,000.00.

It Is Adjudged that the defendant is not guilty as charged in counts 1, 3, 4, 5, 6, 6, 8, 9, 11, 12, 13, 14, and 20.

It Is Ordered that this corrected judgment be and the same is hereby, entered nunc pro tunc as of December 18, 1959.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

T. WHITFIELD DAVIDSON,
United States District Judge.

Filed this 18 day of Dec. 1959, John A. Lowther, Clerk, by Ruth Buckley, Deputy.

JUDGMENT

Extract from the Minutes of February 17, 1961.

No. 18162

D. H. ROE and STRATORAY OIL, INC.

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court.

[84]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18,162

D. H. ROE and STRATORAY OIL, INC., *Appellants*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the United States District Court for the Northern District of Texas.

(May 23, 1961)

On Petition for Rehearing

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

FILED 23rd DAY OF MAY, 1961
EDWARD W. WADSWORTH
Clerk of United States Court of Appeals

15 U.S.C. 77 b (1)

"Definitions

"When used in this subchapter, unless the context otherwise requires—

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust, certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

15 U.S.C. 77 e (a) (1)

"Prohibitions relating to interstate commerce and the mails

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

15 U.S.C. 77 e (a) (2)

"Prohibitions relating to interstate commerce and the mails

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

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No. 102

In the Supreme Court of the United States

October Term, 1961

D. H. Ess and Subsidiary Co., Inc., Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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601213—61

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 162

D. H. ROE AND STRATORAY OIL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 287 F. 2d 435 (Pet. App. 1–15).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1961. A petition for rehearing was denied May 23, 1961. The petition for a writ of certiorari was filed June 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly held that, on the evidence, the issue of whether the oil leases

which the petitioners sold were securities was one to be resolved by the jury on a new trial.

STATUTE INVOLVED

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1) provides:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.
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> * * * * *

STATEMENT

In the United States District Court for the Northern District of Texas, the petitioners were convicted on five counts of unlawful use of the mails in the sale and delivery of unregistered securities in violation of subsections 5(a) (1) and (2) of the Securities Act of 1933, 15 U.S.C. 77e(a) (1) and (2). On appeal, it was held that the allegations of the indictment were sufficient to charge the violations defined in Section 5(a) of the Act, and that the evidence of the transactions alleged, if credited, would constitute "the sale or delivery of an 'invest-

ment contract,' hence a 'security' thereby requiring registration with the SEC'' (Pet. A–9). The court of appeals reversed the conviction, however, because it held that the determination of whether the transactions constitute sales of investment contracts rather than mere leases involved a question of fact which had not properly been submitted to the jury under an [illegible]iate charge. The petitioners seek to have this Court review that determination and hold that, as a matter of law, they were entitled to a judgment of acquittal on the ground that the interests which they sold were not securities.

The pertinent facts may be summarized as follows:

In 1954, Mr. Roe incorporated Stratoray Oil, Inc., of which he became president, and subsequently pursued through that corporation the business of selling oil leases through the mail (R. 31, 32, 337, 405, 416, 553, 569, 644, 728, 737).

The petitioners had acquired oil and gas leases on large blocks of land in Texas and Utah (R. 33, 34, 40–42, 234–238). From March, 1956, through April, 1957, leases to small parcels of 10 to 40 acre units were offered throughout the country (R. 137, 155, 171) at prices starting as low as $3.50 an acre, by means of more than 50,000 letters mailed to prospective investors (R. 83, 85, 87, 96, 100, 103–107, 110, 112, 122, 187, 246, 258, 416, 435, 444, 566, 583, 610, 677). In the year 1956 alone, the petitioners received about $233,000 from the sale of these leases (R. 476). Petitioner Roe testified that toward the end of that year there were "roughly one thousand" investors (R. 418).

Promotional letters sent out by the petitioners described test wells being drilled or to be drilled on or near the parcels of land offered. References were made specifically to two wells, one in Texas, and one in Utah, which were adjacent to the respective leaseholds being offered (R. 562–571, 581, 603–612). It was asserted that Mr. Roe, described as a qualified student of electronics and geophysics and an experienced oil operator (R. 142), had perfected a device known as a scintillator which was a "wholly SCIENTIFIC OIL-HUNTING INSTRUMENT CAPABLE OF DETECTING THE PRESENCE OF RICH OIL ACCUMULATIONS AHEAD OF THE DRILL" (R. 603). By means of this device, it was claimed, he could discover oil deposits which would enable each investor to put himself in position to "REALLY 'CLEAN UP' BIG". (R. 567). Prospective investors were told that Mr. Roe expected to discover a "stupendous volcano of liquid gold" (R. 136) which would "*precipitate a stampede* of oil men seeking to buy leases, willing to bid *high prices*" (R. 680) as high as $2,000 per acre (R. 621).

In addition to the opportunity to become "*BIG RICH*" (R. 630) by the purchase of a lease, Mr. Roe offered investors "*THE PRIORITY RIGHT* TO BUY LEASES ON SUBSEQUENT SELECTIONS MADE BY ME WITH THE INSTRUMENT" which "COULD BE THE MEANS OF *PYRAMIDING* YOUR INITIAL WINNINGS * * * *REPEATEDLY* * * * *UNTIL THEY AMOUNT TO NOTHING LESS THAN OUTRIGHT FORTUNE FOR YOU*" (R. 686).

With respect to the two wells that were the principal subjects of the promotional letters, Mr. Roe's interests were not limited to ownership of neighboring leaseholdings. The site of the well in Utah had been selected by him (R. 39). Gamma Radiation Surveys, Inc., a corporation formed and largely owned by Mr. Roe (R. 37, 426) and of which he was president (R. 425), owned a one-fourth interest in this well (R. 38–39) and paid part of the drilling costs for it (R. 58–60). Part of these funds, which were "donated" to the driller (R. 204), came from Mr. Roe as loans (R. 425). The well in Texas was drilled by a co-incorporator and co-owner of Gamma Radiation Surveys (R. 426, 557–558) on land selected by Mr. Roe by means of his scintillator (R. 375, 630) and owned by Stratoray (R. 45).

ARGUMENT

The determination below that on the evidence a jury could properly find that the petitioners were selling investment contracts was clearly correct under this Court's decisions in *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344 and *Securities and Exchange Commission* v. *Howey Co.*, 328 U.S. 293. There is therefore no reason for this Court to review the interlocutory order of the court of appeals directing a new trial.

In this case, the plan of distribution involved the subdivision of a large tract into small tracts which could not be economically developed individually. The economic inducement was the opportunity to profit from the exploration and drilling operations

of another. There was no suggestion in the sales letters that investors might attempt to develop their own leases, as distinguished from selling them, nor of the means of meeting the financial burdens and other problems purchasers would encounter if they attempted to do so. The petitioners represented that the wells were being drilled on sites selected by them, and entered into detailed discussions of the progress of wells being drilled. Mr. Roe told investors that they could rely on his skill and experience as a scientist. Considering all this evidence together, a jury would clearly be justified in finding that the interests sold by petitioners were an investment contract as that term was defined in the *Howey* decision, 328 U.S. at pp. 298–299:

> * * * an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. * * *

This case is on its facts very close to *Joiner* and *Howey*. The *Joiner* case involved a sales campaign offering assignments of oil leases together with assurances that the offeror was engaged in and would complete the drilling of a test well so located as to test the oil-producing possibilities of the offered leaseholds. Language in the advertising literature emphasized the character of the purchase as an in-

vestment and a participation in an enterprise. This Court held that the interests sold were securities since the economic inducements of the proposed and promised exploration well led purchasers to rely on defendants for an increase in value of their leaseholds. In *Howey* there was an offer for sale of small portions of a large orange grove with the offer of the services of a company engaged in cultivating and developing these groves. Each prospective customer was told that it was not feasible to invest in a grove unless service arrangements were made. The Court held that the contracts sold were "investment contracts" within the meaning of Section 2(1) of the Securities Act since the scheme involved "an investment of money in a common enterprise with profits to come solely from the efforts of others". 328 U.S. at p. 301.

The petitioners seek to distinguish those decisions on the ground that here there was no evidence that the sellers of the leases were in any way responsible for the steps relied upon to increase the value of the leases. As appears from the Statement (*supra*, pp. 4–5), contrary to the petitioners' assertions (Pet. 11), the record supports the determination of the court below that a jury would be justified in finding that the petitioners "had, directly or indirectly, made substantial contributions toward the test wells" (Pet. A–8). Moreover, the representations as to selection of sites for drilling and the stress on Mr. Roe's skill as a scientist indicate that the petitioners invited investors to rely on them for information, advice and protection. This type of representation alone

was sufficient to permit a finding of an "investment contract". See *Securities and Exchange Commission* v. *Wickham,* 12 F. Supp. 245 (D. Minn.), cited in *Howey* (328 U.S. at p. 299). As pointed out in *Joiner* (320 U.S. at p. 353), in the enforcement of the Securities Act "it is not inappropriate that promoters' offerings be judged as being what they were represented to be."

Even without such evidence, however, it is clear that there can be an investment contract. As the court below pointed out (Pet. App. 7), the promoters "were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by the sellers, or by third persons either under, or independent of, their control." What was of significance in this case was the "character the * * * [agreement between promoter and assignee] is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U.S. at pp. 352–353. As in *Joiner,* the "exploration enterprise was woven into these leaseholds, in both an economic and a legal sense"; and as this Court found in *Joiner,* the "trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end." (320 U.S. at pp. 348, 349.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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